FILED
March 8 2010
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0677

RANDALL M. QUAM,
Plaintiff and Appellant,

FILED
MAR 0 8 2010
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

vs.

JAMES R. HALVERSON,
Defendant and Appellee.

On Appeal from the 18th Judicial District Court
Gallatin County
Hon. Mike Salvagni

APPELLANT'S BRIEF

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STATEMENT OF CASE

Attorney James R. Halverson represented the defendant in a lawsuit Randall Quam filed to recover compensation for injuries he suffered in an accident, and Halverson served a subpoena commanding one of Quam's physicians to send his medical records to a court reporter, who copied and sent them to Halverson, without notifying Quam or his counsel. Halverson did not comply with the provisions of the Uniform Health Care Information Act ("UHCIA"), § 50-16-536, MCA, or provide the notice required by Rule 45(b)(1), M.R.Civ.P., and he deprived Quam of the opportunity to seek the protections afforded by Rules 26(c) and 45(c), M.R.Civ.P., and applicable case law. Quam brought this action to vindicate his constitutional right of privacy and the procedural and substantive safeguards that apply to the discovery of medical records by compulsory process. However, the District Court dismissed his complaint for failure to state a claim upon which relief can be granted, ignoring a motion for leave to amend, and denied his motion for summary judgment. Quam appeals.

STATEMENT OF FACTS

Quam filed this action in March 2009. Complaint (CR 1).[1] Then, before Halverson responded, he filed an amended complaint. Amended Complaint (CR 3). The amended complaint alleges:

. . .

> 3. On or about January 27, 2009, Halverson served a subpoena on Dr. John Campbell of Bridger Orthopedic and Sports Medicine in Bozeman, Montana, commanding him to produce confidential health care information relating to Quam but unrelated to the neck injury at issue in his lawsuit. A true and complete copy of that subpoena is attached to Quam's original Complaint as Exhibit 1.
>
> 4. When Halverson served that subpoena, he knew Quam was represented by counsel.
>
> 5. Halverson did not serve a copy of the subpoena on Quam's counsel as required by Rule 45(b)(1), M.R.Civ.P.
>
> 6. Halverson did not give Quam or his counsel 10 days notice of his intention to obtain confidential health care information by compulsory process as required by § 50-16-536(1), MCA.
>
> 7. Dr. Campbell and Bridger Orthopedic and Sports Medicine relied in good faith upon Halverson's subpoena and produced confidential health care information relating to Quam but unrelated to the neck injury at issue in his lawsuit. A true and complete copy of the information produced is attached to Quam's original Complaint as Exhibit 2.
>
> 8. Halverson's failure to comply with the notice requirements set forth in Rule 45(b)(1), M.R.Civ.P., and § 50-16-536(1), MCA, was calculated to deprive Quam of the protections

[1] The abbreviation "CR" refers to the docket numbers in the District Court's Case Register Report.

afforded by Rules 26(c) and 45(c)(2)(B), M.R.Civ.P.

9. Halverson violated the notice requirements set forth in Rule 45(b)(1), M.R.Civ.P., and § 50-16-536(1), MCA, and obtained confidential health care information relating to Quam by unlawful means.

10. Halverson also violated Quam's constitutionally protected right of privacy.

. . .

Amended Complaint (CR 3), at 1-2.

Halverson filed a motion to dismiss, pursuant to Rule 12(b)(6), M.R.Civ.P., arguing that Quam's amended complaint fails to state a claim upon which relief can be granted, and he urged the District Court to consider matters outside the pleadings, including matters of record in the underlying case, *Quam v. Sebena*, Gallatin County Cause No. DV-08-530B. He claimed he sought Quam's medical records under § 50-16-535(1)(c), MCA, which does not require notice, and he argued that Quam has no cause of action for his failure to provide the notice required by Rule 45(b)(1), M.R.Civ.P., because "the logical and customary remedy is to seek relief . . . in the action in which the subpoena was issued." Defendant's Brief (CR 8), at 3-5.[2]

Since Halverson's assertion that he sought Quam's medical records under § 50-16-535(1)(c), MCA, called attention to another violation of the UHCIA – his failure to identify, in his subpoena, at least one subsection of § 50-16-535, MCA,

[2] Halverson's motion did not address Quam's constitutional claim.

under which discovery was sought and certify that it authorized compulsory process, as required by § 50-16-536(2), MCA – Quam pointed out that the subpoena was unlawful, null and void, and that being aggrieved by Halverson's acquisition of his records by unlawful means, he (Quam) is entitled to maintain an action for relief pursuant to § 50-16-553, MCA, adding:

> If this Court finds it significant that Quam's amended complaint does not allege defendant violated § 50-16-536(2), MCA, Quam hereby moves this Court for leave to file a second amended complaint. Defendant has not yet filed a responsive pleading, and will not be prejudiced by an amendment that conforms to the evidence and alleges an additional cause of action arising out of the same facts as Quam's original and first amended complaints.

Plaintiff's Response (CR 13), at 6.[3]

In addition, since Halverson urged the District Court to consider matters outside the pleadings, Quam also pointed out, by reference to the medical records he had produced and filed in *Sebena*,[4] that Halverson knew his subpoena commanded Dr. Campbell to produce records of an injury to a different structure in a different joint in a different part of the body than the injury at issue in *Sebena*. *Id.*, at 6-10. And, to impeach Halverson's claim that he sought Quam's medical records under § 50-16-535(1)(c), MCA, which does not require notice, Quam offered evidence that

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[3] *See also* Plaintiff's Response (CR 13), at 13-14; and Plaintiff's Request for Hearing and Supplemental Brief (CR 29), at 14-15.

[4] The Hon. Mike Salvagni was the presiding judge in *Sebena* too.

when Halverson was first asked to explain why he did not give notice, he responded:

> . . . Any responsibility for not complying fully with the statutory obligations you reference on the medical subpoena rests solely with me. I apologize for the ***oversight***.

Plaintiff's Response (CR 13), at 9 (emphasis added).

Turning to Halverson's argument that Quam has no cause of action for his misappropriation of the subpoena powers granted by Rule 45, M.R.Civ.P., to obtain Quam's medical records by unlawful means, Quam responded that the remedy statutes, §§ 27-1-104, 27-1-105(2), 27-1-107, 27-1-202 and 27-1-701, MCA, liberally construed to effectuate their purpose as required by § 1-2-103, MCA, authorize an action for damages. Plaintiff's Response (CR 13), at 10-13.

Finally, since Halverson's subpoena is a matter of record,[5] and he did not dispute that he failed to give notice of his intention to obtain Quam's medical records by compulsory process, Quam moved the District Court for summary judgment that he violated § 50-16-536(1) and (2), MCA, and Rule 45(b)(1), M.R.Civ.P., and obtained Quam's medical records by unlawful means. Plaintiff's Response (CR 13), at 13-16.

Although Halverson clearly misappropriated the subpoena powers granted by Rule 45, M.R.Civ.P., and obtained Quam's medical records by unlawful means, the District Court dismissed Quam's amended complaint because:

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[5] Copies of Halverson's subpoena are attached to Quam's original complaint (CR 1) as Exhibit 1, and hereto as Appendix 1.

1. Quam did not specifically allege that Halverson sought confidential health care information pursuant to § 50-16-535(1)(b), (d), (e) or (j), MCA.

2. Quam did not allege that Halverson violated § 50-16-536(2), MCA.

3. The District Court did not recognize a cause of action for Halverson's violation of Rule 45, M.R.Civ.P.

4. The District Court did not recognize a cause of action for Halverson's violation of Quam's privacy.

Decision and Order (CR 40), at 4, 5, 7 and 9, copy attached as Appendix 2.

The District Court ignored Quam's motion for leave to file a second amended complaint alleging Halverson violated § 50-16-536(2), MCA, and denied Quam's motion for summary judgment. Decision and Order (CR 40), at 4-5 and 9.

STANDARDS OF REVIEW

Whether the District Court properly granted a motion to dismiss is a conclusion of law, which this Court reviews to determine if the District Court's interpretation and application of the law is correct. *Public Lands Access Ass'n, Inc. v. Jones*, 2008 MT 12, ¶ 9, 341 Mont. 111, 176 P.3d 1005.

This Court reviews the denial of a motion to amend for abuse of discretion. *Emanuel v. Great Falls School Dist.*, 2009 MT 185, ¶ 9, 351 Mont. 56, 209 P.3d 244.

This Court reviews the denial of a motion for summary judgment *de novo*, using the same criteria applied by the District Court. *Schuff v. Jackson*, 2008 MT

81, ¶ 14, 342 Mont. 156, 179 P.3d 1169.

SUMMARY OF ARGUMENT

The District Court erred in dismissing Quam's amended complaint. Quam has a cause of action for Halverson's violation of the UHCIA, and his amended complaint states a claim upon which relief can be granted.

Quam has separate causes of action for Halverson's misappropriation of the subpoena powers granted by Rule 45, M.R.Civ.P., because the remedies provided by the Montana Rules of Civil Procedure are not available when attorneys conduct discovery by unlawful means, and for Halverson's violation of his constitutionally protected privacy; and Quam's amended complaint states claims upon which relief can be granted for that too.

The District Court also erred in ignoring Quam's motion for leave to file a second amended complaint, effectively denying it, and in denying his motion for summary judgment.

ARGUMENT

1. The District Court erred in dismissing Quam's amended complaint.

Cases should be resolved on the merits whenever possible. On a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Fraunhofer v. Price* (1979), 182 Mont. 7, 12, 594 P.2d 324, 327. All that needs to be shown to survive a motion to

dismiss is that there is a set of facts under which the plaintiff could recover. *Glaude v. State Comp. Ins. Fund* (1995), 271 Mont. 136, 139, 894 P.2d 940, 942. This Court has stated that it reviews the dismissal of a complaint for failure to state a claim *de novo*, and will only affirm the dismissal of a complaint if it finds that the plaintiff is not entitled to relief under ***any*** set of facts that could be proven in support of his claim. *See Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 13, 337 Mont. 339, 160 P.3d 552 (the standard of review is *de novo*); and *Advocates for Education, Inc. v. DNRC*, 2004 MT 230, ¶ 8, 322 Mont. 429, 97 P.3d 553. Here, it is beyond cavil that Quam's amended complaint states a claim upon which relief can be granted.

The discovery of confidential health care information by compulsory process is governed by §§ 50-16-535 and 50-16-536, MCA, and Rule 45, M.R.Civ.P. Section 50-16-535, MCA, permits discovery if:

> . . .
>
> (b) the patient has waived the right to claim confidentiality for the health care information sought;
>
> (c) the patient is a party to the proceeding and has placed the patient's physical or mental condition in issue;
>
> . . .

§ 50-16-535(1), MCA.

The discovering party must identify which of those subsections applies, and

certify that it authorizes discovery by compulsory process. § 50-16-536(2), MCA. If discovery is sought pursuant to subsection (b), the discovering party must give 10 days notice, but, inexplicably, no notice is required if discovery is sought pursuant to subsection (c). § 50-16-536(1), MCA. While that may appear to create a loophole, and authorize discovery without notice, the discovery of confidential health care information by compulsory process is also governed by Rule 45, M.R.Civ.P., which clearly requires notice:

> . . . Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

Rule 45(b)(1), M.R.Civ.P.

Although Rule 45, M.R.Civ.P., does not say how much notice is required, it obviously contemplates a reasonable period of time:

> . . . any person affected thereby, may, within 14 days after service of the subpoena . . . serve upon the party or attorney designated in the subpoena written objection to producing of any or all of the designated materials . . . . If objection is made, the party serving the subpoena shall not be entitled to inspect . . . the materials . . . except pursuant to an order of the court by which the subpoena was issued. . . .

Rule 45(c)(2)(B), M.R.Civ.P.

Moreover, Rule 45, M.R.Civ.P., requires the discovering party to compel the production of medical records "at a time and place therein specified." Rule 45(a)(1)(C), M.R.Civ.P. The obvious purpose of that requirement is to prevent *ex*

parte discovery, and notice assures the patient of the protections afforded by Rules 26(c) and 45(c), M.R.Civ.P., and applicable case law, including *State v. Nelson*, (1997), 283 Mont. 231, 242, 941 P.2d 441, 448 (medical records are private and "deserve the outmost constitutional protection"); *St. James Community Hosp. v. District Court*, 2003 MT 261, ¶ 8, 317 Mont. 419, 77 P.3d 534 (the UHCIA requires a compelling state interest to compel production of health care information); and *Henricksen v. State*, 2004 MT 20, ¶ 36, 319 Mont. 307, 84 P.3d 38 (a plaintiff waives his privacy by placing an injury at issue, but only to the extent necessary for the defendant to discover the cause of that injury).

Halverson circumvented all of these rules. He did not give any notice of his intention to obtain Quam's medical records by compulsory process, he did not compel production at a specified time and place, but commanded Dr. Campbell to send the records to a court reporter, who copied and sent them to him, and he deprived Quam of the opportunity to seek the protections afforded by Rules 26(c) and 45(c), M.R.Civ.P., and applicable case law. Simply stated, he misappropriated the subpoena powers granted by Rule 45, M.R.Civ.P., engaged in *ex parte* discovery, and obtained Quam's medical records by unlawful means.

When asked to explain why, Halverson responded:

> . . . Any responsibility for not complying fully with the statutory obligations you reference on the medical subpoena rests solely with me. I apologize for the ***oversight***.

Plaintiff's Response (CR 13), at 9 (emphasis added).

That explanation is incredible. Halverson has represented both plaintiffs and defendants in personal injury cases for many years, and he is an experienced litigator. He knew Quam was entitled to notice, he engaged in *ex parte* discovery to deprive Quam of the opportunity to seek a protective order, and, when Quam tried to conduct discovery to prove his failure to provide notice was no "oversight," he sought and obtained a stay of discovery. Defendant's Motion to Stay Proceedings (CR 17); and Order Staying Discovery (CR 35).

1.1 Quam has a cause of action for Halverson's violation of the UHCIA, and his amended complaint states a claim upon which relief can be granted.

Quam has a cause of action for Halverson's violation of the UHCIA. Section 50-16-553, MCA, provides:

> A person aggrieved by a violation of this part may maintain an action for relief as provided in this section.
>
> . . .
>
> If the court determines that there is a violation of this part, the aggrieved person is entitled to recover damages for pecuniary losses sustained as a result of the violation and, in addition, if the violation results from willful or grossly negligent conduct, the aggrieved person may recover not in excess of $5,000, exclusive of any pecuniary loss.
>
> If a plaintiff prevails, the court may assess reasonable attorney fees and all other expenses reasonably incurred in the litigation.

§ 50-16-553(1), (6) and (7), MCA.

The obvious purpose of statutory damages is to enforce the public policy articulated in § 50-16-502, MCA, in the absence of pecuniary losses, and the availability of attorney fees and costs enables patients to obtain legal assistance to vindicate their rights. *See Laudert v. Richland County Sheriff's Department*, 2001 MT 287, ¶ 17, 307 Mont. 403, 38 P.3d 790.

Quam's amended complaint states a claim upon which relief can be granted pursuant to § 50-16-553, MCA. The rules of pleading provide in pertinent part:

> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. . . .

Rule 8(a), M.R.Civ.P.

Quam's amended complaint complies with those requirements. It contains a short, plain statement of Quam's claim, showing that he is entitled to relief, and a demand for judgment for the relief he seeks. The purpose of a pleading is to give notice of the nature of a claim. *Tobacco River Lumber Co. v. Yoppe* (1978), 176 Mont. 267, 270, 577 P.2d 855, 856. Quam's amended complaint certainly did that. It may not identify every statutory provision Halverson violated, but Quam has a cause of action, and his amended complaint states a claim upon which relief can be granted pursuant to § 50-16-553, MCA.

Although Halverson clearly violated the UHCIA and obtained Quam's medical records by unlawful means, the District Court dismissed Quam's amended

complaint because he did not specifically allege that Halverson sought his medical records under § 50-16-535(1)(b), (d), (e) or (j), MCA. Decision and Order (CR 40), at 4. However, nothing in § 50-16-553, MCA, or Rule 8(a), M.R.Civ.P., requires that kind of specificity. If the District Court found it significant that Quam did not identify the specific subsection under which Halverson sought discovery, it should have allowed him to amend his complaint. *See Larson v. First Interstate Bank of Kalispell* (1990), 241 Mont. 350, 357, 786 P.2d 1176, 1181.

Turning to Halverson's violation of § 50-16-536(2), MCA, the District Court found that violation "immaterial" because Quam did not mention it in his amended complaint. Decision and Order (CR 40), at 5. However, nothing in § 50-16-553, MCA, or Rule 8(a), M.R.Civ.P., requires that either, and if the District Court found the omission significant, it should have allowed Quam to cure that by amendment too. *Larson*, 241 Mont. at 357, 786 P.2d at 1181.

Quam has a cause of action for Halverson's violation of the UHCIA, his amended complaint states a claim upon which relief can be granted, and the District Court erred in dismissing it.

1.2 Quam has a separate cause of action for Halverson's misappropriation of the subpoena powers granted by Rule 45, M.R.Civ.P.

While § 50-16-553, MCA, provides a cause of action for Halverson's violation of § 50-16-536(1) and (2), MCA, the remedy statutes provide a cause of

action for his misappropriation of the subpoena powers granted by Rule 45, M.R.Civ.P. Sections 27-1-104 and 27-1-105, MCA, state that the breach of a legal obligation is actionable. Section 27-1-107, MCA, states that the remedy is compensation. Section 27-1-202, MCA, eliminates any room for argument:

> Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

It makes no difference whether Halverson acted intentionally or negligently. Section 27-1-701, MCA, provides:

> . . . [E]veryone is responsible not only for the results of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person except so far as the latter has willfully or by want of ordinary care brought the injury upon himself.

The District Court noted that although these statutes authorize "an expansive range of civil actions," they have never been construed to provide a remedy for the misappropriation of the subpoena powers granted by Rule 45. Decision and Order (CR 40), at 6. However, the absence of precedent – attributable to the fact that other attorneys obey the law – does not support dismissal.

> The statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect their objects and to promote justice.

§ 1-2-103, MCA.

The District Court all but ignored the remedy statutes, and, characterizing Halverson's subpoena as an "ordinary method of discovery," stated that it was well equipped to address his violation of Rule 45(b)(1), M.R.Civ.P., in *Sebena*. Decision and Order (CR 40), at 6-7. However, the District Court was wrong about that. While Rules 26(c) and 45(c), M.R.Civ.P., would have provided protection if Halverson had notified Quam of his intention to obtain Quam's records by compulsory process prior to obtaining them, neither provides a remedy, and neither permits Quam to conduct discovery and cross-examine Halverson to disprove his claim of "oversight". Cross-examination is the "greatest legal engine ever invented for the discovery of truth." *State v. Mizenko*, 2006 MT 11, ¶ 13, 330 Mont. 299, 127 P.3d 458 (citations omitted). Depriving Quam of the right to conduct discovery, and a jury trial on damages, affords Halverson immunities not available to other tortfeasors.[6]

Halverson did not engage in a method of discovery authorized by the Montana Rules of Civil Procedure. Rule 45, M.R.Civ.P., may authorize attorneys to subpoena medical records, but only "at a time and place therein specified," and "prior notice . . . shall be served on each party in the manner prescribed by rule 5(b)." Rules 45(a)(1)(C) and (b)(1), M.R.Civ.P. The obvious purpose of these requirements is to prevent *ex parte* discovery and assure the patient of the

[6] Although Quam did not request a jury trial, he still has the right to do so. *See* Rule 38(b), M.R.Civ.P.

protections afforded by Rules 26(c) and 45(c), M.R.Civ.P. Conducting *ex parte* discovery by means of an unlawful subpoena, without notice, is not an "ordinary method of discovery."

The District Court held that it was not necessary to recognize a separate cause of action, citing *Oliver v. Stimson Lumber Co.*, 1999 MT 328, 297 Mont. 336, 993 P.2d 11. Decision and Order (CR 40), at 7. However, the District Court's reliance on *Oliver* is misplaced. Nobody in *Oliver* misappropriated the subpoena powers granted by Rule 45, M.R.Civ.P., to obtain an opposing party's medical records by unlawful means.

The protections and remedies provided by the Montana Rules of Civil Procedure are not available when parties conduct discovery by unlawful means. *Jaap v. District Court* (1981), 191 Mont. 319, 323, 623 P.2d 1389, 1392. Since the rules do not provide a remedy for discovery by unlawful means, after the fact, but the remedy statutes do, and must be liberally construed to effectuate their purpose and promote justice pursuant to § 1-2-103, MCA, it should be beyond cavil that Quam is entitled to maintain an action for damages.

1.3 Quam also has a cause of action for Halverson's violation of his constitutionally protected privacy.

Halverson's misappropriation of the subpoena powers granted by Rule 45, M.R.Civ.P., is not a mere "infraction" of the rule. Defendant's Reply Brief (CR 18), at 1. His misappropriation of those powers to obtain Quam's medical records

without notice, depriving Quam of the opportunity to seek the protections afforded by Rules 26(c) and 45(c), M.R.Civ.P., and applicable case law, violated Quam's constitutionally protected privacy:

> **Right of privacy.** The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Mont. Const., Art. II, § 10.

In 1985, this Court held that the phrase "without . . . a compelling state interest" indicates the delegates to the 1972 Constitutional Convention intended to proscribe state action. *State v. Long* (1985), 216 Mont. 65, 69-71, 700 P.2d 153, 156-57. Although later decisions, discussed below, limit that ruling, in a criminal case involving the suppression of evidence of a crime discovered by a landlord who entered his tenant's house illegally, to search and seizure cases, Halverson argued it was controlling, and the District Court relied on it in dismissing Quam's amended complaint:

> Pursuant to the Montana Supreme Court's decision in *Long*, the Court finds that individuals do not have a cause of action against private citizens who have allegedly violated their constitutional right to privacy. Halverson is a private citizen and was not acting under color of state law at the time he issued the allegedly unlawful subpoena. Accordingly, the Court finds that Quam's Amended Complaint should be dismissed with prejudice to the extent that it seeks recovery for Halverson's alleged violation of his constitutional right to privacy.

Decision and Order (CR 40), at 9.

However, the District Court was wrong about that. Even if *Long* was controlling, it would not affect Quam's constitutional claim because Halverson acted under color of state law when he misappropriated the subpoena powers granted by Rule 45, M.R.Civ.P.

When this Court amended Rule 45, M.R.Civ.P., in 1999, and authorized attorneys to issue subpoenas,[7] it gave them unprecedented power to invade individual privacy. Although nobody has alleged that the State of Montana shares liability for Halverson's misappropriation of that power, it cannot reasonably be disputed that he acted under color of state law.

> . . . In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, . . . if it delegates its authority to the private actor, . . . or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior . . . . Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179, 192, 109 S.Ct. 454, 462 (1988) (citations omitted).

The District Court rejected the idea that Halverson was acting under color of state law, without analysis. Decision and Order (CR 40), at 9. However, it ignored the mantle of authority this Court provided when it amended Rule 45,

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[7] In re: Amending Rules 4, 41(e), and 45 of the Montana Rules of Civil Procedure, dated September 28, 1999.

M.R.Civ.P. When this Court authorized attorneys to issue subpoenas, it created the legal framework that allowed Halverson to invade Quam's privacy under color of state law. Indeed, his subpoena, issued on behalf of the District Court pursuant to Rule 45(a)(3), M.R.Civ.P., commanded Dr. Campbell to produce Quam's medical records under penalty of contempt. Complaint (CR 1), Exhibit 1. The District Court may not have appreciated how that enhanced Halverson's power, but the color of state law was not lost on Dr. Campbell, who obviously believed the subpoena was valid, and produced Quam's records. *Id.*, Exhibit 2.

Quam did not ask the District Court to go out on a limb in recognizing his constitutional claim. In *Deserly v. Department of Corrections*, 2000 MT 42, 298 Mont. 328, 995 P.2d 972, this Court affirmed prior rulings that the "wrongful intrusion into one's private activities in such a manner as to outrage . . . a person of ordinary sensibilities" gives rise to a cause of action for the invasion of privacy. *Id.*, at ¶ 17. Medical records contain personal and sensitive information that if improperly used or released may do significant harm to a patient's interests. § 50-16-502(1), MCA. Most people consider their medical records confidential, and would be outraged by Halverson's acquisition of their records by unlawful means. The District Court found *Deserly* inapplicable because it did not arise out of a violation of the Montana Rules of Civil Procedure. Decision and Order (CR 40), at 6. However, *Deserly* clearly supports Quam's constitutional claim.

So does *Dorwart v. Caraway*, 2002 MT 240, 312 Mont. 1, 58 P.3d 128. In that case, a judgment debtor sued a county sheriff and deputies after they seized his property, alleging among other things that they violated his constitutionally protected privacy. After analyzing the common law origins of his cause of action, this Court stated:

> . . . We . . . conclude that those rights protected by Article II, Sections 10, 11 and 17 of the Montana Constitution are self-executing . . . . We conclude that this result is further compelled by our own statutory law and, in particular, §§ 1-1-109 and 27-1-202, MCA. ...
> . . .
>
> Section 27-1-202, MCA, provides that:
>
> > Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.
>
> Either statute standing alone reinforces our decision based on the legislative policy of this state. However, when considered together, and with the right found at Article II, Section 16 of the Montana Constitution to a remedy for every injury, this body of statutory and constitutional law ***permits no other result.***

Dorwart, 2002 MT 240, ¶ 44-45 (emphasis added).

Although this Court held in *Long* that the delegates to the 1972 Constitutional Convention intended to proscribe state action, this Court has since held that the Montana Constitution, Article II, Section 10, also proscribes unnecessary invasions of privacy by defense counsel conducting discovery in personal injury actions. *See, e.g., State ex rel. Mapes v. District Court* (1991), 250

Mont. 524, 530, 822 P.2d 91, 95 (a "defendant's need for discovery must be balanced by plaintiff's constitutional right to privacy found in Mont. Const. Art. II, § 10"); and *Simms v. District Court,* 2003 MT 89, ¶ 32, 315 Mont. 135, 68 P.3d 678 ("a request for an ordered independent medical examination must be weighed against the right to privacy provided for at Art. II, Section 10, of the Montana Constitution . . ."). And, although this Court continues to affirm *Long* in search and seizure cases, it has stated that the Montana Constitution, Article II, Section 10, proscribes private invasions of privacy in other contexts too. For example, in *Armstrong v. State,* 1999 MT 261, 296 Mont. 361, 989 P.2d 364, a constitutional challenge to a statute requiring that abortions be performed by physicians, this Court reviewed the transcripts of the 1972 Constitutional Convention and concluded:

> . . . it is clear from their debates that the delegates intended this right of privacy to be expansive – that it should encompass more than traditional search and seizure. ***The right of privacy should also address information gathering and protect citizens from illegal private action*** and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private.

Armstrong, ¶ 13 (emphasis added).

In *Associated Press, Inc., v. Dept. of Revenue*, 2000 Mont. 160, 300 Mont. 233, 4 P.3d 5, Justice Nelson elaborated, stating in a special concurrence:

> . . . [T]he 1972 Constitution of Montana and, in particular, its Article II Declaration of Rights is a compact with the people. The

> Declaration of Rights serves as a shield to protect each individual from the excesses of government, from the tyranny of the majority, ***and from the sorts of abuses perpetrated by persons . . . that, in pursuit of their own interests and agenda, effectively would deprive the people of those things essential to their humanity and to their lawful individual pursuits.***

Associated Press, 2000 MT 160, ¶ 55 (emphasis added).

In *Commission on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, 334 Mont. 311, 147 P.3d 200, a contempt action against a tribal court advocate who insisted that he did not need a license to practice law in order to give legal advice and filed a counterclaim against the Commission and the State Bar for invasion of privacy, this Court, addressing the counterclaim, left no room for argument:

> The Bar and the Commission . . . argue that there is no private right of action against a non-governmental entity. They maintain that the privacy section of the Montana Constitution contemplates privacy invasion by state action only. On the contrary, we stated in *Armstrong* that Article II, Section 10 of the Montana Constitution was intended by the delegates to protect citizens ***from illegal private action*** and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private.

Commission, at ¶ 56 (emphasis original).

Privacy is a fundamental right and a significant component of liberty, and any infringement must trigger the highest level of protection by the courts. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 52, 310 Mont. 123, 54 P.3d 1. The highest level of protection is assured by recognizing that Quam has a

constitutional cause of action, and a constitutional right to seek redress:

> Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character. . . .

Mont. Const., Art. II, § 16.

Of course, Quam would have the same cause of action if Halverson had broken into Dr. Campbell's office and stolen his records:

> . . . Common law causes of action intended to regulate relationships among and between individuals are not adequate to redress the type of damage caused by the invasion of constitutional rights.
>
> . . .
>
> For these reasons, we conclude that . . . a cause of action for money damages is available for violation of those rights guaranteed by Article II, Sections 10 and 11 of the Montana Constitution.

Dorwart, 2002 MT 240, ¶ 46, 48.

The Montana Constitution, Article II, Section 10, prohibits the misappropriation of the subpoena powers granted by Rule 45, M.R.Civ.P., to obtain a patient's medical records without notice, and Quam has a constitutional cause of action. As this Court stated in *Dorwart*, the Montana Constitution and the remedy statutes permit no other result.

2. The District Court erred in denying Quam's motion for leave to file a second amended complaint.

When Halverson asserted that he sought Quam's medical records under § 50-16-535(1)(c), MCA, Quam pointed out that his subpoena did not identify at

least one subsection of § 50-16-535 under which discovery was sought and certify that it authorized compulsory process, as required by § 50-16-536(2), and moved the District Court for leave to file a second amended complaint. Plaintiff's Response (CR 13), at 6 and 13-14; and Plaintiff's Request for Hearing and Supplemental Brief (CR 29), at 14-15.

Rule 15, M.R.Civ.P., states in pertinent part:

> **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. ... Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

It is an abuse of discretion to refuse amendments which are offered at a reasonable time and which should be made in the furtherance of justice. *Loomis v. Luraski*, 2001 MT 223, ¶ 41, 306 Mont. 478, 36 P.3d 862. As this Court explained in *Prentice Lumber Co. v. Hukill* (1972), 161 Mont. 8, 504 P.2d 277:

> 'Rule 15 is one of the most important of the rules that deal with pleadings. It re-emphasizes and assists in attaining the objective of the rules on pleadings: that pleadings are not an end in themselves, but are only a means to the proper presentation of a case; that at all times they are to assist, not deter, the disposition of litigation on the merits.'
>
> The United States Supreme Court reiterated the philosophy of Rule 15 in *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222, 226, wherein it held the district court's denial of leave to amend even after judgment was error where there was no apparent or declared reason for denying leave to amend the complaint:
>
> 'Rule 15(a) declares that leave to amend 'shall be freely given

> when justice so requires'; this mandate is to be heeded. (Citing Moore's Federal Practice) if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given.' ***Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.'***

Prentice Lumber, 161 Mont. at 17-18, 504 P.2d at 282 (emphasis added).

The District Court denied Quam's motion to amend by ignoring it, and that denial, without any justifying reason, was not an exercise of discretion; it was an abuse of discretion. Halverson never filed a responsive pleading, and would not have been prejudiced by an amendment that conforms to the evidence and alleges an additional cause of action arising out of the same facts as Quam's original and first amended complaints.

3. The District Court erred in denying Quam's motion for summary judgment.

On a motion to dismiss for failure to state a claim, if the moving party presents matters outside the pleadings, the motion must be treated as one for summary judgment:

> Rule 12(c), M.R.Civ.P., provides that if, on a motion for a

> judgment on the pleadings, the party relies on matters outside the pleadings, the court ***shall*** treat the motion as one for summary judgment . . . .

Rafanelli v. Dale, 1998 MT 331, ¶ 21, 292 Mont. 277, 971 P.2d 371 (emphasis added).

Thus, by urging this Court to take judicial notice of the record in *Sebena* and claiming he sought Quam's medical records under § 50-16-535(1)(c), MCA, Halverson converted his motion to dismiss into a motion for summary judgment. Then, Quam filed a motion for summary judgment of his own. Plaintiff's Response (CR 13), at 13-16.

The purpose of summary judgment is to eliminate issues not deserving of trial. *Downs v. Smyk* (1979), 185 Mont. 16, 21, 604 P.2d 307, 310. Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P.

Halverson's subpoena is a matter of record, and it is beyond cavil that he failed to comply with the certification requirement set forth in § 50-16-536(2), MCA, which rendered the subpoena unlawful, null and void. Thus, at the very least, Quam is entitled to summary judgment that Halverson violated § 50-16-536(2), MCA, and acquired Quam's records by unlawful means.

However, Quam is entitled to more than that. Although Halverson never filed a responsive pleading, he does not dispute that he failed to give notice of his intention to obtain Quam's medical records by compulsory process. Decision and

Order (CR 40), at 4. His subpoena, copy attached as Appendix 1, has no certificate of service, and when asked to explain why, he claimed it was an oversight. Plaintiff's Response (CR 13), at 9. Moreover, he would not argue that he sought production of Quam's records pursuant to § 50-16-535(1)(c), MCA, which does not require notice, if he had given notice. Under these circumstances, Quam is also entitled to summary judgment that Halverson failed to give the notice required by Rule 45(b)(1), M.R.Civ.P., and obtained Quam's medical records by unlawful means.

The purpose of summary judgment is to encourage judicial economy by eliminating issues not deserving of trial. *See Reaves v. Reinbold* (1980), 189 Mont. 284, 288, 615 P.2d 896, 898. Quam had the initial burden of establishing the absence of any genuine issue of material fact. *See Estate of Nielsen v. Pardis* (1994), 265 Mont. 470, 473, 878 P.2d 234, 235. Once he met that burden, the burden shifted to Halverson to set forth specific facts, by affidavit or otherwise, establishing a genuine issue of material fact. *Id.* Halverson never met that burden.

Under these circumstances, Rule 56(c), M.R.Civ.P., requires the entry of summary judgment:

> . . . The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

For all of the reasons set forth above, this Court should enter summary

judgment that Halverson violated §§ 50-16-536, MCA, and Rule 45(b)(1), M.R.Civ.P., invaded Quam's constitutionally protected privacy, and acquired his medical records by unlawful means.

CONCLUSION

The District Court erred in dismissing Quam's amended complaint, in ignoring his motion for leave to file a second amended complaint, and in denying his motion for summary judgment. This Court should reverse the District Court on all three issues, enter summary judgment as requested, and remand this case for further proceedings, including the discovery Quam needs to prove Halverson's failure to provide notice was no "oversight," and a trial on damages.

DATED this 10 day of March, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2002 for Windows, is 7,025 words, not averaging more than 280 words per page, including certificate of service and certificate of compliance.

DATED this 6 day of March, 2010.

Martin R. Studer

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing was duly served upon the following by depositing the same, postage prepaid and addressed as indicated, in the mail this 6 day of March, 2010.

Allan Baris
Moore, O'Connell
& Refling, P.C.
P.O. Box 1288
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Martin R. Studer